Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 94-428

In The

Supreme Court of the United States

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

WILLIAM H. VAUGHAN, JR.
VAUGHAN & LAWRENCE, P.A.
23 Broad Street, Post Office Box 1559
Charleston, South Carolina 29402
(803) 723-3020

Attorneys for Respondent, the South Carolina State Ports Authority

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Do the Federal Courts have jurisdiction over actions against a State Agency when the State has designated that such actions are to be brought only in that State's Court?

Is the South Carolina State Ports Authority one of those special state affiliated bodies which are denied Eleventh Amendment Immunity?

Has the United States Court of Appeals for the Fourth Circuit rendered a decision that "created additional conflict or sharpened existing conflicts" between the opinions of the Second Circuit Court of Appeals and the Third Circuit Court of Appeals?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE (ERRORS AND OMISSIONS IN PETITIONER'S STATEMENT OF CASE) 2

I. The Parties 2

II. The Incident in Question 7

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. General Discussion of the Eleventh Amendment 9

II. Do Federal Courts have Jurisdiction Over Actions Against a State Agency When the State has Designated that Such Actions are to be Brought in the State's Courts? 11

III. Is the Authority One of Those Special State Affiliated Bodies Which are Denied Eleventh Amendment Immunity? 13

A. Petitioners' Action Is Against State Funds and Property 13

B. Procurement of Insurance Should Not Cause Loss of Eleventh Amendment Immunity... 14

TABLE OF CONTENTS – Continued

Page

C. The Authority Enjoys Continued Funding by the State 16

D. The Court of Appeals Found that the Authority Met its Tests for Eleventh Amendment Immunity..... 17

IV. Has the United States Court of Appeals for the Fourth Circuit Rendered a Decision that "Created Additional Conflict or Sharpened Existing Conflicts" Between the Opinions of the Courts of Appeals for the Second and Third Circuits?..... 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985)..... 12

Bolden v. Southeastern Pennsylvania Transp. Auth., 953 F.2d 807 (3d Cir. 1991), cert. den., ___ U.S. ___, 112 S. Ct. 2281, 119 L.Ed.2d 206 (1992)..... 14

Feeney v. Port Authority Trans-Hudson Corporation, 873 F.2d 628, (2d Cir. 1989), aff'd on other grds. 495 U.S. 299, 110 S. Ct. 1868, 109 L.Ed.2d 264 (1990)..... 16, 18, 19

Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655 (3d Cir. 1989), cert. den., 493 U.S. 850, 110 S. Ct. 148, 107 L.Ed.2d 107 (1989)..... 15

Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed. 389 (1945)..... 11, 14

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1984)..... 16

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed.2d 401 (1979)..... 20

Penhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984) ...10, 12

Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey, 819 F.2d 413 (3d Cir. 1987), cert. den., 484 U.S. 953, 108 S. Ct. 344, 98 L.Ed.2d 370 (1987).....18, 19

Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F.2d 456 (4th Cir. 1987) 17

TABLE OF AUTHORITIES - Continued

Page

Rink v. Richland Memorial Hospital, ___ S.C. ___, 422 S.E.2d 747 (1992) 8

Royal Caribbean v. Puerto Rico Ports Authority, 973 F.2d 8 (1st Cir. 1992) 15, 16

Searcy v. Dept. of Education, 303 S. C. 544, 402 S.E.2d 486 (Ct. App. 1991)..... 8

OTHER AUTHORITIES

South Carolina Code Ann.:

Sec. 2-17-130.....2, 6

8-13-100.....2, 6

9-1-10.....2, 4

9-1-20.....2, 4

15-78-10..... 2, 6, 11

15-78-20.....2, 6, 7, 12

15-78-30..... 2, 6, 11

15-78-40.....2, 6

15-78-100.....2, 6, 7, 12

15-78-110..... 2, 6, 7

30-4-15.....2, 6

30-4-20.....2, 6

30-4-30.....2, 6

42-7-10.....2, 4

TABLE OF AUTHORITIES – Continued

Page

42-7-40 ..... 2, 4

42-7-60 ..... 2, 4

48-39-150 6

54-3-10 *et seq* 2

54-3-20 3

54-3-130 4

54-3-140 6

54-3-150 ..... 2, 4

54-3-170 4

54-3-610 6

54-3-860 6

54-3-1010 5

54-3-1020 3

54-3-1040 6

54-3-1050 ..... 2, 3

South Carolina Constitution, Article X, section 8 10

United States Constitution, Eleventh Amendment 11

No. 94-428

In The

Supreme Court of the United States

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the Eleventh Amendment of the United States Constitution, set forth on page C1 of Petitioners' Appendix, and Article X, section 8 of the South Carolina Constitution which reads as follows:

> Money shall be drawn from the treasury of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law.

The statutes involved are quite lengthy, and their texts are located in the two Appendices. *S.C. Code Ann.* § 54-3-10 *et seq.* (1976 and Supp. 1992) is found on page C2-54 of Petitioners' Appendix. In Respondent's Appendix, the following statutory provisions are found: *S.C. Code Ann.* §§ 2-17-130; 8-13-100; 9-1-10; 9-1-20; 15-78-10; 15-78-20; 15-78-30; 15-78-40; 15-78-100; 15-78-110; 30-4-15; 30-4-20; 30-4-30; 42-7-10; 42-7-40; 42-7-60; 48-39-150.

STATEMENT OF THE CASE

Error and Omissions in Petitioner's Statement of Case

I. The Parties

The nature and status of the Defendant South Carolina State Ports Authority ("Authority") is the principal issue. The scanty and argumentative description of the Authority by the Petitioner is inadequate.

The following facts were presented to the Court of Appeals:

The Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in *S.C. Code Ann.* §§ 54-3-10 to 54-3-1050 (1976 & Supp. 1992).

The Authority is governed by a Board, all the members of which are appointed by the Governor of the State

of South Carolina, with the advice and consent of the South Carolina Senate. *S.C. Code Ann.* § 54-3-20 (1976).

The property of the State Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State. *S.C. Code Ann.* § 54-3-1050 (1976).

All net earnings of the State Ports Authority not necessary or desirable for the operation of its business shall be and have been held subject to further action of the South Carolina General Assembly. *S.C. Code Ann.* § 54-3-1020 (1976).

The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand Dollars for the initial operation of capital and maintenance of the port's facilities of the State Ports Authority. The General Assembly of the State of South Carolina made annual appropriations for the operation of the State Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959.

Since 1959, the General Assembly of the State of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance certain capital improvements for the State Ports Authority.

The State of South Carolina has issued a total in excess of One Hundred Thirty-two Million Dollars worth of general obligations bonds to finance certain capital improvements for the Authority. The proceeds of these bonds were deposited in the State Treasury and were

distributed to the Authority on the direction of the General Assembly.

The employees of the State Ports Authority are under the State Employees Workers' Compensation Plan *S.C. Code Ann.* §§ 42-7-10, 42-7-40, 42-7-60, and the South Carolina Retirement System (for State employees) *S.C. Code Ann.* §§ 9-1-10, 9-1-20.

The Authority is, and has engaged in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, namely, Port Royal, Charleston and Georgetown for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the State. *S.C. Code Ann.* § 54-3-130 (1976).

The Authority has a broad power of eminent domain and has exercised this power. *S.C. Code Ann.* 54-3-150 (1976, as amended).

The Authority has the power to take exclusively, occupy, and use and possess insofar as may be necessary to carry out its functions, any area of land owned by the State of South Carolina, the counties of Beaufort, Georgetown and Charleston, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining and the said State Ports Authority has exercised this power. *S.C. Code Ann.* § 54-3-170 (1976 Supp. 1992).

The general obligation bonds issued by the State of South Carolina to fund some of the projects of the State Ports Authority are paid (both interest and principal) from the general state funds appropriated by the General Assembly.

In addition, revenue bonds have been issued by the State Ports Authority to fund some of the projects of the State Ports Authority and are authorized by State law. *S. C. Code Ann.* § 54-3-1010 (1976, as Amended). Other agencies of the State issue revenue bonds in the same manner as does the State Ports Authority. The State Ports Authority revenue bonds are tax exempt.

In 1992, the State of South Carolina designated the Authority as the agency to acquire the site for the new BMW plant in Spartanburg County and to perform other obligations of the State to BMW. Thirty-two Million Dollars were transferred from the State Treasury to the account of the State Ports Authority to pay the purchase price of the land. An additional Eight Million Dollars was transferred to prepare the site for BMW's use. The Authority also used Five Million Dollars of funds already in its account to provide additional funds to acquire the property for this plant site.

The State Ports Authority is listed as an agency for the State in each annual Legislative Manual, and its operations are included in each annual Comprehensive Financial Statement of the State of South Carolina.

The Authority has no stock, no stockholders, and no private interests in its operations.

The Authority and its officials and employees are subject to the State Ethics Act. *S.C. Code Ann.* § 2-17-130 and § 8-13-100.

The Authority appoints and hires the Executive Director of the Authority, and he serves at the pleasure of the board. The Board of the Authority supervised the employment of all other employees of the Authority.

The Staff of the Authority works with the staff of the other State agencies on a daily basis.

The Authority publishes its annual report in newspapers throughout the State (*S.C. Code Ann.* § 54-3-1040) and delivers it to the General Assembly. (*S.C. Code Ann.* § 54-3-860).

The Authority has quasi-police type controls over the Port (See title 54 of S.C. Code) and must approve (*S.C. Code Ann.* § 54-3-610, *et seq.*) or certify all private piers in the Port of Charleston, and in other critical areas. (See §§ 48-39-150.)

Loss claims and legal actions against the State Ports Authority are controlled by the South Carolina Tort Claims Act. *S.C. Code Ann.* §§ 15-78-10, 15-78-20, 15-78-30, 15-78-40, 15-78-100, 15-78-110, and the State Ports Authority is subject to the S.C. Freedom of Information Act *S.C. Code Ann.* §§ 30-4-15, 30-4-20, 30-4-30. The Authority may hold property either in its name or in the name of the State (*S.C. Code Ann.* § 54-3-140).

The State Ports Authority is an agency of the State of South Carolina, is in a real sense a part of the State and shares in its sovereignty, and is completely identified

with the State and the performance of its functions which are unquestionably of a governmental character.

II. The Incident in Question

The Authority generally denies the recitation of events. The gist of the Petitioner Ristow's complaint is that in 1988, while unloading his truck on State terminal property landside, the cargo slipped and Ristow was hurt. He claims the accident was the state's fault. Most of the corrections are irrelevant to the appeal. Some of the specific corrections are listed in Respondent's Appendix at page 3. We note here some important fact omissions.

The first and second claims alleged in Plaintiff's Complaint are covered by the South Carolina Tort Claims Act. *S.C. Code Ann.* § 15-78-110 provides that any action under the S.C. Tort Claims Act is barred unless commenced or a verified claim filed within two years after the occurrence. *S.C. Code Ann.* § 15-78-100 requires that the action be brought in the State Circuit Court in the County where the act or omission occurred. *S.C. Code Ann.* § 15-78-20(e) specifically states

> (e) Nothing in this chapter is construed as a waiver of the State's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

Plaintiff commenced this action in the United States District Court for the District of South Carolina almost three years after the incident of December 20, 1988, and

Plaintiff never filed a verified claim. (Appendix of Petitioners at D15 and D16). Plaintiff claimed a waiver disallowed under South Carolina Law (Appendix of Petitioners at D15 and D16 and *Rink v. Richland Memorial Hospital*, ___ S.C. ___, 422 S.E.2d 747 (1992) and *Searcy v. Dept. of Education*, 303 S.C. 544, 402 S.E.2d 486 (Ct. App. 1991)).

SUMMARY OF THE ARGUMENT

Petitioner's claim is basically a claim in tort against the Authority which is subject to the S.C. Tort Claims Act. The S.C. Tort Claims Act specifies that such claims must be brought in the state courts and denies any waiver of the Eleventh Amendment. The Petitioners elected to bring the action in federal court in violation of the terms and conditions of the Tort Claims Act.

The Authority was created and was and continues to be controlled by the state. All its funds and assets come from the state. It is known generally and regarded as the "State Ports Authority." The Authority's capital investments were funded by state general obligation bonds pledging the full faith and credit of the state. The state pays annually both principal and interest on such bonds. The Authority raises its operating funds by renting the state property and by fees collected for the services rendered by state employees.

No local governments contribute any funds or have any control over the Authority. The Authority's activities are statewide, serving the citizens of South Carolina and

other states. The Authority has no charter, is not incorporated, has no stockholder, and all the members of its controlling board are appointed by the Governor of South Carolina with the consent of the South Carolina Senate.

This Court of Appeals decision is not in conflict with the decision of any Court of Appeals as modified by this court. This decision confirms the decisions on this subject in the United States District Court for the District of South Carolina over approximately the last 50 years.

ARGUMENT

I. General Discussion of the Eleventh Amendment

The basic questions under the Eleventh Amendment are: is the state public body claiming such immunity the alter ego of the state; is the state the real party in interest; and, would a judgment against such body expose State property and funds? All of these basic questions are easily answered – yes. Note that the Petitioners' Complaint described the Authority as "an agency of the State of South Carolina." Also Petitioner said the State is the Authority's stockholders (Petition for Cert. page 57). The Petitioners argue that the Eleventh Amendment applies only when the state is named or when a judgment against the state official, department, agency, or authority would expose the account denominated as the "State Treasury." The Eleventh Amendment is not so restricted and none of the authorities Petitioners cited say that.

If the Eleventh Amendment were to be interpreted as Petitioners contend and applied to the South Carolina

government: none of the Executive or judicial branches of the government would be entitled to Eleventh Amendment protections. The South Carolina Constitution provides: "Money shall be drawn from the Treasury of the State . . . only in pursuance with appropriations made by law." *S.C. Constitution*, Article X § 8. Today all state governments operate through officials, departments, bureaus, agencies, and authorities. The Plaintiff's interpretation would permit a litigant to avoid the Eleventh Amendment by making the specific agency or department the defendant. They now all have their own stationary and accounts. In the case at hand the Plaintiff came to federal court to avoid the limitations and restrictions contained in the S.C. Tort Claims Act. This is one of the very abuses the Eleventh Amendment was designed to prevent.

Petitioner argues "The central goal of the Eleventh Amendment is to shield state treasuries from federal court judgments" (Petition for Cert., p. 21). None of the cases cited by petitioners make such a statement or holding. They say only that protection of state funds is a very important factor to be considered.

In *Penhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 906, 79 L.Ed.2d 67 (1984), the court said the intent of the framers of the Eleventh Amendment was "that States could not be made unwilling defendants in federal court" (*Id.* at 98, n. at 7) and "the fundamental principle of sovereign immunity limits the grant of judicial authority in article III." (*Id.* at 98).

The Eleventh Amendment protects the right of the states to handle their own affairs with citizens of other

states and foreign countries as long as no federal or national issues are involved. It is more than just protection for an account labeled "the State Treasury." Petitioner's unreasonably narrow interpretation of the Eleventh Amendment would open the federal courts to arbitrate disputes involving the states which involve no national interests.

II. Do Federal Courts have Jurisdiction over Actions Against a State Agency When the State has Designated that Such Actions are to be Brought in the State's Courts?

The discussion in *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed. 389 (1945), answers this question with a no. In that case the court held that when a state made a limited waiver of sovereign immunity and specified that citizens should sue the state in its state courts, the federal courts should honor this specification and grant Eleventh Amendment immunity in federal court unless the state waived immunity in federal court. In the case at hand, South Carolina expressly reserved its Eleventh Amendment immunity.

The Complaint alleges a claim of negligence against the State Ports Authority. Torts against the state are governed by the South Carolina Tort Claims Act, *S.C. Code Ann.* §§ 15-78-10, *et seq.* (enacted 1986). This act expressly includes state authorities. *S.C. Code Ann.* §§ 15-78-30 and 15-78-40. Therefore, unlike many of the older federal cases where Eleventh Amendment immunity was denied,

the state here has provided a forum for Plaintiffs' Complaint.

All claims mentioned by the Complaint arose after passage of the S.C. Tort Claims Act. This Act states that the General Assembly intended to grant immunity from liability and suit in tort except as waived in the Act. *S.C. Code Ann.* § 15-78-20(b). The Act further expressly states in part that: "Jurisdiction for any action brought under this Chapter is in the Circuit Court and brought in the county in which the act or omission occurred." *S.C. Code Ann.* §§ 15-78-100(b). Furthermore, § 15-78-20(e) specifically disclaims any waiver of the state's Eleventh Amendment immunity.

The designation by the state of where suit may be brought is to be given effect under the Eleventh Amendment. As stated by this Court, "A State's Constitutional interest in immunity encompasses not merely whether it may be sued, but *where* it may be sued." *Penhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L.Ed.2d 67 (1984) (emphasis added). It is established law that waiving immunity for suit in its own Courts does not constitute waiver of the Eleventh Amendment or consent to submit to jurisdiction in Federal Courts. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L.Ed.2d 175 (1985).

Therefore, since the state has provided a forum for this type of action, this suit should have been brought in State Court, and was properly dismissed from federal court.

III. Is the Authority One of Those Special State Affiliated Bodies Which are Denied Eleventh Amendment Immunity?

A. Petitioner's Action Is Against State Funds and Property.

Petitioner argues that, although the Authority is an agency of the State of South Carolina, it should be denied Eleventh Amendment immunity because it is possible or arguably probable that any judgment will not be paid out of the account labeled "the State Treasury."

Any judgment against the Authority would be paid with state funds, or by the sale of state property, or by insurance whose premiums were paid with state funds. All funds available to the Authority come from the state treasury, from rental of state property, or from fees charged for services rendered by state employees.

Indeed, had Petitioner commenced his action in the prescribed court and within the prescribed time, the judgment would have been against the South Carolina State Ports Authority account at a time when it contained $40 Million of general state funds. None of the cases cited by Petitioner contain the comingling of state funds which are present in this case. While the account labeled "State Treasury" was protected, state funds and state property were not.

If the General Assembly decided to abolish the Authority, no person or body could claim the property and the funds then in the name of the Authority against

the state. Applying an "actual financial analysis", everything in the Authority's name belongs to the state and Petitioner's action is one for recovery of money from the state. "And when the action is in essence one for recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit. . . . " *Ford Motor Co., v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464, 655 S. Ct. 347, 89 L.Ed. 389 (1945). Petitioner's interpretation of the Eleventh Amendment is unreasonably narrow and technical.

B. Procurement of Insurance Should Not Cause Loss of Eleventh Amendment Immunity.

Purchase of insurance is simply a good business practice to protect the state from financial disaster. The Eleventh Amendment should never be construed to protect only those United States who do not protect themselves with insurance. Procurement or non-procurement of insurance is not a valid test of statehood.

Petitioner cited three Court of Appeals decisions to support their claim that purchasing insurance should be fatal to Eleventh Amendment immunity. Petitioner claims that procurement of insurance was a key factor in each case. A review of the cases shows otherwise.

In *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807 (3d Cir. 1991), cert. den., ___ U.S. ___, 112 S. Ct. 2281, 119 L.Ed.2d 206 (1992), the court found that only 27% of that Authority's revenues came from the state, (*Id.* at 819); that the Authority could not pledge the credit of the state and the state was not liable

for payment of principal and interest on the bonds issued (*Id.* at 819); that Authority had a separate corporate existence (*Id.* at 820); and that only 5 of that Authority's 15 board members were appointed by the state (the others were appointed by counties). The only mention of insurance was a statement that that Authority had the power to "buy insurance." (*Id.* at 820). This case is no authority for Petitioner's assertion.

In *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989), cert. den., 493 U.S. 850, 110 S. Ct. 148, 107 L.Ed.2d 107 (1989), the court found that NJT received substantial annual operating subsidies from the federal government (*Id.* at 660); that federal and local sources provided most of NJT's capital (*Id.* at 660); that NJT is self insured and had the authority to purchase insurance (*Id.* at 660). Here the court noted that at least part of any judgment would be paid by insurance (*Id.* at 661). Still, this is a long way from saying that a pure state agency such as the South Carolina State Ports Authority should be denied Eleventh Amendment immunity just because it has insurance.

In *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992), the court found that PRPA operations were proprietary rather than governmental (*Id.* at 10); that any judgment would likely be paid out of operating funds (*Id.* at 10); that PRPA had a legal existence separate and apart from those of the Commonwealth (*Id.* at 11). PRPA had to pay a fee in lieu of taxes (*Id.* at 12). In this case the court pointed out as an aside "Further, the Ports Authority has insurance which would insulate the Commonwealth treasury from the effects of an adverse judgment." The principal basis for denying

immunity in the *Royal Caribbean* case, *supra*, was its determination that ports authority activities were proprietary rather than governmental notwithstanding the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1984).

None of these decisions make procurement of insurance a key issue. We suggest that procurement of insurance should never be a key issue in whether a state receives Eleventh Amendment protection. We have enough bad business management in government; there is no need to encourage it.

C. The Authority Enjoys Continued Funding by the State.

Petitioner argues that the Authority lacks a "continued funding provision", ignoring the State's continuing payment of the principal and interest on the general obligation bonds issued to fund the Authority's capital expenses and the funding of projects beyond the Authority's capabilities.

Petitioner's terminology comes apparently from the *Feeney v. Ports Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989) aff'd on other grds, 495 U.S. 299, 110 S. Ct. 1868, 109 L.Ed.2d 264 (1990). The defendant in that case was a terminal railroad corporation owned by the bi-state New York and New Jersey Port Authority. The two states signed a compact to create that port authority. The states were each committed to pay up to $100,000.00 for the operating expenses of that port authority if its funds were

inadequate. The New York and New Jersey Ports Authority is a special body. Most state authorities have no commitment that the state will continue to fund it or will even continue to keep it in existence.

The South Carolina State Ports Authority has no commitment from the General Assembly that it will continue to fund the Authority or that the State will continue to keep in existence.

D. The Court of Appeals Found That the Authority Met the Fourth Circuit Tests for Eleventh Amendment Immunity.

The Court of Appeals for the Fourth Circuit applied that circuit's test for Eleventh Amendment immunity found in the *Ram Ditta v. Maryland National Capital Park and Planning Commission*, 822 F.2d 456 (4th Cir. 1987). The *Ram Ditta* test is as follows:

(1) whether the state treasury will be responsible for paying any judgment that might be awarded;

(2) whether the entity exercises a significant degree of autonomy from the state;

(3) whether it is involved local versus statewide concerns; and

(4) how the entity is treated as a matter of state law (Petitioner's Appendix, pages 6 and 7).

The first three were found to favor immunity, and the fourth was inconclusive.

While state decisions were inconclusive on the issue (because it has never been raised), the Court of Appeals

found that the United States District Court for the District of South Carolina has consistently found the Authority to be the Alter Ego of the State and granted it Eleventh Amendment immunity over a 50 year period. (Petitioner's Appendix page 26).

The Court of Appeals also considered the forum designated in the S.C. Tort Claims Act as the exclusive forum for Petitioner's claim. (Petitioner's Appendix p. 27). This also compelled a grant of Eleventh Amendment immunity.

The cases cited by Petitioner show the type of state related bodies which are denied Eleventh Amendment immunity by some of the Courts of Appeal. You will notice that they are significantly different from the South Carolina State Ports Authority.

IV. Has the United States Court of Appeals for the Fourth Circuit Rendered a Decision That "Created Additional Conflict or Sharpened Existing Conflicts" Between the Opinions of the Second Circuit Court of Appeals and of the Third Circuit Court of Appeals?

The Petitioners have tried to create the appearance of a conflict among the circuits. Petitioners point to two cases, one in the Third Circuit, *Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3rd Cir. 1987), cert. den., 484 U.S. 953, 108 S. Ct. 344, 98 L.Ed.2d 370 (1987), and one in the Second Circuit, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), aff'd on other grds 495 U.S. 299, 110 S. Ct. 1868, 109 L.Ed.2d 264 (1990), as

evidence of this conflict. Petitioners claim that the Third Circuit has used a "broad financial approach", while the Second Circuit has supposedly used an "actual financial analysis" (both terms having been coined by Petitioners.)

In truth, whatever conflict may have existed between the Circuits in those cases has been resolved on the Supreme Court level. The Fourth Circuit's decision in the present case merely follows the more practical approach of the Third Circuit in granting Eleventh Amendment immunity to a state agency which has become in some ways self sufficient (Appendix, 16 and 17). In the *Port Police* case, the Third Circuit found that the Port Authority for New York and New Jersey was entitled to Eleventh Amendment immunity. *Port Police*, 819 F.2d at 418. This Court left that decision undisturbed and denied certiorari.

A conflict was created when the Second Circuit in the *Feeney* case found that the same Port Authority was not entitled to Eleventh Amendment immunity, or in the alternative, had waived its immunity through a state statute. *Feeney*, 873 F.2d at 628-629. This court resolved that conflict when it decided the *Feeney* case. The Supreme Court assumed that the Port Authority was entitled to Eleventh Amendment immunity, but that the State of New York had waived it. Thus, that conflict was ended.

Furthermore, there is a fundamental difference between the Authority here and the Port of New York and New Jersey. Unlike the New York/New Jersey Port, the South Carolina Authority was not formed by a bi-state compact. Instead, it is a traditional agency of one state, operating within that state, and serving the purposes of that state.

As Petitioners acknowledge in their Supplemental Brief, the case of *"Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed.2d 401 (1979), is believed to have established a presumption against Eleventh Amendment immunity for entities created by interstate compact." Petitioners' Supplemental Brief, p. 8. Such a presumption does not exist in the present case, so the Fourth Circuit was correct in using a broader approach than the approach necessary to judge the Port of New York and New Jersey.

The Fourth Circuit, finding facts at least as strong as those involved with the Port of New York and New Jersey, found that the Authority here was entitled to Eleventh Amendment immunity, and that this immunity had not been waived.

CONCLUSION

The Respondent Authority asks this Court to deny certiorari in this case.

Respectfully submitted,

VAUGHAN & LAWRENCE, P.A.

WILLIAM H. VAUGHAN, JR.
23 Broad Street
Post Office Box 1559
Charleston, SC 29402
(803) 723-3020

Attorneys for Respondent
South Carolina State Ports Authority

October 6, 1994
Charleston, South Carolina

No. 94-428

In The

Supreme Court of the United States

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX FOR BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

INDEX TO APPENDIX

Page

A. TECHNICAL CORRECTIONS TO PETITIONERS' STATEMENT OF CASE

THE INCIDENT IN QUESTION.....App. 1

B. LIST OF UNDERWRITERS COMPRISING THE LIABILITY INSURERS OF SOUTH CAROLINA STATE PORTS AUTHORITY..... App. 2

C. STATUORY PROVISIONS INVOLVED

S.C. CODE:

Section 2-17-130 .....App. 5

Section 8-13-100 .....App. 6

Section 9-1-10 .....App. 14

Section 9-1-20 .....App. 19

Section 15-78-10 .....App. 20

Section 15-78-20 .....App. 20

Section 15-78-30 .....App. 24

Section 15-78-40 .....App. 27

Section 15-78-100 .....App. 27

Section 15-78-110 .....App. 28

Section 30-4-15 .....App. 28

Section 30-4-20 .....App. 29

Section 30-4-30 .....App. 31

Section 42-7-10 .....App. 33

Section 42-7-40 .....App. 33

Section 42-7-60 .....App. 34

Section 48-39-150 .....App. 35

Technical Corrections to Petitioner's Statement of Case

II. The Incident in Question

The Authority disputes the facts of the incident involved as set forth in the first paragraph on pages 5 and 6 of Petition for Certiorari. We acknowledge that Petitioner had an accident on that day, and at that general location, and that he may have been injured. In the second paragraph the insurer is incorrectly identified as Lloyds of London. The insurance carrier is a group of corporate insurers belonging to the London Institute of Underwriters. (A list of insurers is at page 4 in the Appendix).

We have no direct knowledge of what happened between Petitioners and the insurance adjuster, but doubt that he discouraged Petitioners from retaining counsel

We have no direct knowledge of the matters in the paragraph on page 7. We are informed and believe that the adjuster ordered a check for $75,000.00. When the check arrived, he tendered the check to Petitioners but refused to accept check or sign settlement papers. At that time, Petitioners advised the adjuster that they would retain counsel. The adjuster advised them that the statute of limitations would run in a few days, and that they should act promptly.

On page 8 of the Petition, the complaint speaks for itself. The Authority denied the paragraph on 8 and 9 on jurisdiction. The Authority's motion and Petitioners' response speak for themselves. On pages 10 through 17, the orders and decisions speak for themselves.

11.111%	COMMERCIAL UNION ASSURANCE CO. PLC
11.111%	OCEAN MARINE INSURANCE COMPANY LTD.
7.407%	INDEMNITY MARINE ASSURANCE COMPANY LTD. "T" A/C
5.926%	PRUDENTIAL ASSURANCE COMPANY LTD. TRUST NO. 2 A/C
5.926%	PHOENIX ASSURANCE PLC L A/C PER: THE LONDON ASSURANCE
5.926%	LONDON & HULL MARITIME INSURANCE COMPANY LTD.
5.925%	INSURANCE COMPANY OF NORTH AMERICA (UK) LTD "C" A/C
5.556%	NORTHERN ASSURANCE COMPANY LTD U/W AGENCY NO. 5 A/C
3.056%	ORION INSURANCE COMPANY PLC T A/C
0.370%	SKANDIA U.K. INSURANCE PLC T A/C
0.278%	YASUDA FIRE & MARINE INSURANCE CO. OF EUROPE LTD. T A/C
2.108%	SOVEREIGN MARINE & GENERAL INSURANCE CO. LTD.
0.309%	THE TOKIO MARINE & FIRE INSURANCE CO. (U.K.) LTD.
0.412%	TAISKO MARINE & FIRE INSURANCE CO. (U.K.) LTD.
0.206%	STOREBRAND INSURANCE COMPANY. (U.K.) LTD.
0.154%	ATLANTIC MUTUAL INSURANCE COMPANY
0.206%	ALLIANCE INTERNATIONAL INSURANCE CO. LTD.
0.309%	WAUSAU INSURANCE COMPANY (U.K.) LTD.
3.704%	THREADNEEDLE INSURANCE COMPANY LTD.

3.704%	PHOENIX ASSURANCE PLC A A/C PER ALLIANCE ASSURANCE CO. LTD.
2.222%	NORWICH UNION FIRE INSURANCE SOCIETY LTD. NO. 1 A/C
2.963%	MINSTER INSURANCE COMPANY LTD. NO. 3 A/C
2.222%	SCOTTISH LION INSURANCE COMPANY LTD.
2.963%	BISHOPSGATE INSURANCE LIMITED "M" A/C
1.852%	PHOENIX ASSURANCE PLC
0.787%	ENGLISH & AMERICAN INSURANCE COMPANY LTD.
0.556%	SWITZERLAND INSURANCE COMPANY (U.K.) LIMITED
0.324%	NIPPON FIRE & MARINE INSURANCE CO. (U.K.) LTD.
0.185%	FUJI FIRE & MARINE INSURANCE COMPANY (U.K.) LTD.
0.926%	HANSA MARINE INSURANCE COMPANY (U.K.) LTD.
0.926%	VESTA (U.K.) INSURANCE COMPANY LTD.
1.111%	ATLAS ASSURANCE COMPANY LTD T A/C
1.111%	BALTICA SCANDINAVIA INSURANCE COMPANY (U.K.) LTD.
1.111%	LA REUNION FRANCAISE SOC. ANON. D'ASSURANCES ET DES REASSURANCES P.L. A/C
1.852%	FIREMAN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY U.K. BRANCH (MOAC)
1.852%	CORNHILL INSURANCE PLC "C" A/C
1.185%	ANDREW WEIR INSURANCE COMPANY LTD.
0.296%	ANDREW WEIR INSURANCE COMPANY LTD. "W" A/C

1.481%	ASSICURAZIONI GENERALI
0.370%	COLONIA INSURANCE COMPANY (U.K.) LTD.
100.000%	

LIMIT: US $20,000,000.00
12 MONTHS AT AUGUST 1, 1988

ALL OF THE INSURERS ARE MEMBERS OF THE INSTITUTE OF LONDON UNDERWRITERS

---

§ 2-17-130. Penalties For violations of provisions of this chapter.

(A) A lobbyist or a lobbyist's principal who wilfully violates the provisions of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned for not more than one year, or both. In addition, any lobbyist or lobbyist's principal convicted of or pleading guilty or nolo contendere to a misdemeanor under the provisions of this section is barred from acting as a lobbyist or a lobbyist's principal for a period of three years from the date of the conviction.

(B) A member of the General Assembly, the Governor, the Lieutenant Governor, any other statewide constitutional officer, any public official of any state agency who engaged in covered agency actions, or any of their employees who wilfully violate the provisions of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned for not more than one year, or both.

(C) The payment of any fines does not in any way excuse or exempt any person required to file from the filing requirements of this chapter.

---

§ 8-13-100. Definitions.

As used in Articles 1 through 11:

(1)(a) "Anything of value" or "thing of value" means:

(i) a pecuniary item, including money, a bank bill, or a bank note;

(ii) a promissory note, bill of exchange, an order, a draft, warrant, check, or bond given for the payment of money;

(iii) a contract, agreement, promise, or other obligation for an advance, a conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money;

(iv) a stock, bond, note, or other investment interest in an entity;

(v) a receipt given for the payment of money or other property;

(vi) a chose-in-action;

(vii) a gift, tangible good, chattel, or an interest in a gift, tangible good, or chattel;

(viii) a loan or forgiveness of indebtedness;

(ix) a work of art, an antique, or a collectible;

(x) an automobile or other means of personal transportation;

(xi) real property or an interest in real property, including title to realty, a fee simple or partial interest in realty including

present, future, contingent, or vested interests in realty, a leasehold interest, or other beneficial interest in realty;

(xii) an honorarium or compensation for services;

(xiii) a promise or offer of employment;

(xiv) any other item that is of pecuniary or compensatory worth to a person.

(b) "Anything of value" or "thing of value" does not mean:

(i) printed informational or promotional material, not to exceed ten dollars in monetary value;

(ii) items of nominal value, not to exceed ten dollars, containing or displaying promotional material;

(iii) a personalized plaque or trophy with a value that does not exceed one hundred fifty dollars;

(iv) educational material of a nominal value directly related to the public official's, public member's, or public employee's official responsibilities;

(v) an honorary degree bestowed upon a public official, public member, or public employee by a public or private university or college;

(vi) promotional or marketing items offered to the general public on the same terms and conditions without regard to status as a public official or public employee; or

(vii) a campaign contribution properly received and reported under the provisions of this chapter.

(2) "Appropriate supervisory office" means:

(a) the State Ethics Commission for all persons required to file reports under this chapter except for those members of or candidates for the office of State Senator or State Representative;

(b) the Senate Ethics Committee for members of or candidates for the office of State Senator and the House of Representatives Ethics Committee for members of or candidates for the office of State Representative.

(3) "Business" means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

(4) "Business with which he is associated" means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

(5) "Candidate" means a person who seeks appointment, nomination for election, or election to a state or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or election. "Candidate" does not include a person within the meaning of Section 431(b) of the Federal Election Campaign Act of 1976.

(6) "Compensation" means money, anything of value, an in-kind contribution or expenditure, or economic benefit conferred on or received by a person.

(7) "Confidential information" means information, whether transmitted orally or in writing, which is obtained by reason of the public position or office held and is of such nature that it is not, at the time of transmission, a matter of public record or public knowledge.

(8) "Consultant" means a person, other than a public official, public member, or public employee who contracts with the State, county, municipality, or a political subdivision thereof to:

(a) evaluate bids for public contracts, or

(b) award public contracts.

(9) "Contribution" means a gift, subscription, loan, guarantee upon which collection is made, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit of money or anything of value made to a candidate or committee, as defined in Section 8-13-1300(6), for the purpose of influencing an election; or payment or compensation for the personal service of another person which is rendered for any purpose to a candidate or committee without charge. "Contribution" does not include volunteer personal services on behalf of a candidate or committee for which the volunteer receives no compensation from any source.

(10) "Corporation" means an entity organized in the corporate form under federal law or the laws of any state.

(11)(a) "Economic interest" means an interest distinct from that of the general public in a

purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

(12) "Election" means:

(a) a general, special, primary, or runoff election;

(b) a convention or caucus of a political party held to nominate a candidate; or

(c) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or the Constitution of this State.

(13) "Elective office" means an office at the state, county, municipal, or political subdivision level. For the purposes of Articles 1 through 11, the term "elective

office" does not include an office under the unified judicial system except that for purposes of campaign practices, campaign disclosure, and disclosure of economic interests, "elective office" includes the office of probate judge.

(14) "Expenditure" means a purchase, payment, loan, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit, transfer of funds, a gift of money, or anything of value for any purpose.

(15) "Family member" means an individual who is:

(a) the spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild;

(b) a member of the individual's immediate family.

(16) "Gift" means anything of value, including entertainment, food, beverage, travel, and lodging given or paid to a public official, public member, or public employee to the extent that consideration of equal or greater value is not received. A gift includes a rebate or discount on the price of anything of value unless it is made in the ordinary course of business without regard to that person's status. A gift does not include campaign contributions accepted pursuant to this chapter.

(17) "Governmental entity" means the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed. "Governmental entity" also means any charitable organization or foundation, but not an athletic organization or athletic foundation which is associated with a state educational

institution and which is organized to raise funds for the academic, educational, research, or building programs of a college or university.

(18) "Immediate family" means:

(a) a child residing in a candidate's, public official's, public member's, or public employee's household;

(b) a spouse of a candidate, public official, public member, or public employee; or

(c) an individual claimed by the candidate, public official, public member, or public employee or the candidate's, public official's, public member's, or public employee's spouse as a dependent for income tax purposes.

(19) "Income" means the receipt or promise of any consideration, whether or not legally enforceable.

(20) "Individual" means one human being.

(21) "Individual with whom he is associated" means an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

(22) "Loan" means a transfer of money, property, guarantee, or anything of value in exchange for an obligation, conditional or not, to repay in whole or in part.

(23) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action.

(24) "Person" means an individual, a proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, an estate, a company, committee, an association, a corporation, club, labor organization, or any other organization or group of persons acting in concert.

(25) "Public employee" means a person employed by the State, a county, a municipality, or a political subdivision thereof.

(26) "Public member" means an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

(27) "Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. "Public official" does not mean a member of the judiciary except that for the purposes of campaign practices, campaign disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter.

(28) "Represent" or "representation" means making an appearance, whether gratuitous or for compensation, before a state agency, office, department, division,

bureau, board, commission, or council, including the General Assembly, or before a local or regional government office, department, division, bureau, board, or commission.

(29) "Substantial monetary value" means a monetary value of five hundred dollars or more.

---

§ 9-1-10. Definitions.

The following words and phrases as used in this chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) *"Retirement System"* or *"System"* shall mean the South Carolina Retirement System established under § 9-1-20;

(2) *"Public school"* shall mean any day school conducted within the State under the authority and supervision of a duly elected or appointed city, district or county school board;

(3) *"Teacher"* shall mean any teacher, helping teacher, attendance teacher, librarian, principal, supervisor, superintendent of public schools, superintendent of public instruction, county superintendent of education, person employed in the office of a county superintendent of education, bus driver and any other person employed in the public schools supported by the State, counties and school districts;

(4) *"Employee"* shall mean (a) to the extent he is compensated by the State, any employee, agent or officer of the State or any of its departments, bureaus and institutions, other than the public schools, whether such employee is elected, appointed or employed, (b) the president, any dean, professor or teacher or any other person employed in any college, university or educational institution of higher learning supported by and under the control of the State, (c) any agent or officer of any county, municipality or school district, or of any agency or department thereof, which shall have been admitted to the System under the provisions of § 9-1-470, to the extent he is compensated for services from public funds, (d) any employee of the extension service and any other employee a part of whose salary or wage is paid by the Federal Government if the Federal funds from which such salary or wage is paid shall before disbursement be and become State funds and (e) any employee of any service organization, the membership of which is composed solely of persons eligible to be teachers or employees as defined by this section, if the compensation received by the employees of such service organizations shall be provided from moneys paid by the members as dues or otherwise or from funds derived from public sources and if the employee contributions prescribed by this Title shall be paid from the funds of the service organization; the word

"employee" shall not include Supreme and circuit court Judges;

(5) *"Employer"* shall mean the State, a county board of education, a district board of trustees, a city board of education, the board of trustees or other managing board of any State-supported college or educational institution or any other agency of the State by which a teacher or employee is paid; the term *"employer"* shall also include any county, municipality or other political subdivision of the State, or any agency or department thereof, which shall have been admitted to the System under the provisions of § 9-1-470 or any service organization referred to in paragraph (4) of this section;

(6) "Member" shall mean any teacher or employee included in the membership of the System as provided in Article 5 of this chapter and for the purpose of establishing additional service it shall mean in service;

(7) *"Board"* shall mean the State Budget and Control Board which shall act under the provisions of this chapter through its division of personnel administration;

(8) *"Medical Board"* shall mean the board of physicians provided for in § 9-1-220;

(9) *"Service"* shall mean service as a teacher or employee rendered to and paid for by an employer;

(10) *"Prior service"* shall mean service rendered as a teacher or employee prior to the date

of membership for which credit is allowable under Article 7 of this chapter;

(11) *"Membership service"* shall mean service as a teacher or employee rendered while a member of the System;

(12) *"Creditable service"* shall mean prior service plus membership service for which credit is allowable as provided in Article 7 of this chapter;

(13) *"Beneficiary"* shall mean any person in receipt of a pension, an annuity, a retirement allowance or other benefit provided under the System;

(14) *"Regular interest"* shall mean interest compounded annually at such rate as shall be determined by the Board in accordance with § 9-1-280;

(15) *"Accumulated contribution"* shall mean the sum of all the amounts deducted from the compensation of a member and credited to his individual account in the employee annuity savings fund, together with regular interest thereon, as provided in Article 9 of this chapter;

(16) *"Earnable compensation"* shall mean the full rate of the compensation that would be payable to a teacher or employee if he worked for his full normal working time; when compensation includes maintenance, fees and other things of value the Board shall fix the value of that part of the compensation not paid in money directly by the employer;

(17) "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service on which regular contributions as a member were made to the System producing the highest such average; an amount up to and including forty-five days termination pay for unused annual leave may be added to the pay period immediately prior to retirement and included in the average as applicable. Average final compensation for an elected official may be calculated as the average annual earnable compensation for the thirty-six consecutive months prior to the expiration of his term of office;

(18) *"Employee annuity"* shall mean annual payments for life derived from the accumulated contributions of a member;

(19) *"Employer annuity"* shall mean annual payments for life derived from money provided by the employer;

(20) *"Retirement allowance"* shall mean the sum of the employer annuity and the employee annuity or any optional benefit payable in lieu thereof;

(21) *"Retirement"* shall mean the withdrawal from active service with a retirement allowance granted under the System;

(22) *"Employee annuity reserve"* shall mean the present value of all payments to be made on account of an employee annuity or

benefit in lieu thereof, computed on the basis of such mortality tables as shall be adopted by the Board and regular interest;

(23) *"Employer annuity reserve"* shall mean the present value of all payments to be made on account of an employer annuity or benefit in lieu thereof, computed upon the basis of such mortality tables as shall be adopted by the Board and regular interest; and

(24) *"Actuarial equivalent"* shall mean a benefit of equal value when computed upon the basis of such mortality tables as shall be adopted by the Board and regular interest.

---

§ 9-1-20. South Carolina Retirement System created; System shall have powers and privileges of corporation; purposes of System.

A retirement system is hereby established and placed under the management of the State Budget and Control Board for the purpose of providing retirement allowances and other benefits for teachers and employees of the State and political subdivisions or agencies or departments thereof. The System so created shall have the power and privileges of a corporation and shall be known as the South Carolina Retirement System, and by such name all of its business shall be transacted, all of its funds invested and all of its cash, securities and other property held.

---

§ 15-78-10. Short title.

This chapter may be cited as the "South Carolina Tort Claims Act".

---

§ 15-78-20. Legislative findings; declaration of public policy; extent of, and construction of, waiver of immunity.

(a) The General Assembly finds that while a private entrepreneur may be readily held liable for negligence of his employees within the chosen ambit of his activity, the area within which government has the power to act for the public good has been without limit and, therefore, government did not have the duty to do everything which might have been done. The General Assembly further finds that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities. Thus, while total immunity from liability on the part of the government is not desirable, see McCall v. Batson, neither should the government be subject to unlimited nor unqualified liability for its actions. The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions. Additionally, the General Assembly recognizes the impossibility of insuring for acts retrospectively. The General Assembly seeks an orderly transition to the

recognition of individuals' rights against the tortious sovereign as defined herein. Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein. It is further declared to be the public policy of the State of South Carolina that to insure an orderly transition from sovereign immunity to qualified and limited liability that the General Assembly intends to provide for liability on the part of the State and its political subdivisions only from July 1, 1986, forward in prospective fashion. No governmental entity which was not insured at the time of the injury for which compensation is sought is liable under this chapter and those which were insured are liable only to the extent provided herein. Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.

(b) The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil

remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b).

(c)(i) As to those causes of action that arise or accrue prior to the effective date of this act, the General Assembly reinstates sovereign immunity on the part of the State, its political subdivisions and employees, while acting within the scope of official duty provided that sovereign immunity will not bar recovery in any case of action arising or accruing on or before the effective date of this act if the defendant maintained liability insurance coverage.

(ii) In such cases involving governmental health care facilities, as defined in § 15-78-30(j), recovery shall not exceed the limits of the liability insurance coverage up to a maximum recovery of five hundred thousand dollars.

(iii) In all other such cases recovery shall not exceed the limits of the liability insurance coverage.

(d) Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract.

(e) Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

(f) The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its

political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State.

(g) The General Assembly recognizes the competing interests of either providing physicians and dentists qualified immunity under the provisions of the South Carolina Tort Claims Act or continuing unqualified liability for medical malpractice actions brought against governmentally employed physicians or dentists. While patients deserve accountable and competent health care, regardless of the public or private character of the provider, governmental entities, in order to attract qualified physicians and dentists, must be able to offer an affordable compensation and employment package, including liability insurance. The General Assembly, in amending this chapter, intends to provide an orderly transition from noninclusion to inclusion of physicians and dentists under the provisions of this chapter. Additionally, the liability limits, and hence mandated insurance coverage, of governmental entities for acts of physicians or dentists, acting within the scope of their profession, are set somewhat higher than those provided for other types of governmental liability. These higher limits and mandated coverages are recognition by the General Assembly of significantly higher damages in cases of medical malpractice. To this end, inclusion of physicians and dentists within this chapter has been delayed until January 1, 1989, when an affordable program of group liability insurance will be instituted.

---

§ 15-78-30. Definitions.

(a) "Agency" means the individual office, agency, authority, department, commission, board, division, instrumentality, or institution, including a state-supported governmental health care facility, school, college, university, or technical college, which employs the employee whose act or omission gives rise to a claim under this chapter.

(b) "Claim" means any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty.

(c) Prior to January 1, 1989, "Employee" means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation, but the term does not include an independent contractor doing business with the State or any political subdivision thereof. Custody of prisoners by the State or any of its political subdivisions does not in and of itself create an employer and employee relationship between the State and the prisoner. Provided, the provisions of this section shall in no way limit or modify the liability of a licensed physician or dentist, acting within the scope of his profession.

On or after January 1, 1989, "Employee" means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law

enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation, but the term does not include an independent contractor doing business with the State or any political subdivision thereof. Custody of prisoners by the State or any of its political subdivisions does not in and of itself create an employer and employee relationship between the State and the prisoner. Provided, the provisions of this section shall in no way limit or modify the liability of a licensed physician or dentist, acting within the scope of his profession, with respect to any action or claim brought hereunder which involved services for which the physician or dentist was paid, should have been paid, or expected to be paid at the time of the rendering of the services from any source other than the salary appropriated by the governmental entity.

(d) "Governmental entity" means the State and its political subdivisions.

(e) "State" means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges.

(f) "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in

actions for negligence, but does not include the intentional infliction of emotional harm.

(g) "Occurrence" means an unfolding sequence of events which proximately flow from a single act of negligence.

(h) "Political subdivision" means the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of § 58-25-20 which provides public transportation on behalf of a regional transportation authority, and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof.

(i) "Scope of official duty" or "scope of state employment" means (1) acting in and about the official business of a governmental entity and (2) performing official duties.

(j) "Governmental health care facility" means one which is operated by the State or a political subdivision through a governing board appointed or elected pursuant to statute or ordinance and which is tax-exempt under state and federal laws as a governmental entity and from which no part of its net income from its operation accrues to the benefit of any individual or nongovernmental entity. Health care facility includes any facility as defined in Title 44, S.C. Code Ann. for the provision of mental or physical care to individuals, whether or not it is required to be licensed under those provisions.

---

§ 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.

The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

---

§ 15-78-100. When and where to institute action; requirement of special verdict specifying proportionate liability of multiple defendants.

(a) Except as provided for in Section 15-3-40, an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered. Provided, that if a claim for damages was filed and disallowed or rejected an action for damages filed under this chapter, based upon the same occurrence as the claim, may be instituted within three years after the loss was or should have been discovered.

(b) Jurisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred.

(c) In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of

fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

---

§ 15-78-110. Statute of limitations.

Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter when the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

---

§ 30-4-15. Findings and purpose.

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or

delay to the persons seeking access to public documents or meetings.

---

§ 30-4-20. Definitions.

(a) "Public body" means any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

(b) "Person" includes any individual, corporation, partnership, firm, organization or association.

(c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or

characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or record which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act; nothing herein authorizes or requires the disclosure of those records where the public body, prior to January 20, 1987, by a favorable vote of three-fourths of the membership, taken after receipt of a written request, concluded that the public interest was best served by not disclosing them. Nothing herein authorizes or requires the disclosure of records of the Board of Financial Institutions pertaining to applications and surveys for charters and branches of banks and savings and loan associations or surveys and examinations of the institutions required to be made by law.

(d) "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss

or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

(e) "Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body.

---

§ 30-4-30. Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice.

(a) Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.

(b) The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Fees charged by a public body must be uniform for copies of the same record or document. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without

charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.

(c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

---

§ 42-7-10. Establishment of State Accident Fund; contents.

(A) There is established as a separate agency of state government a separate fund to be known as the State Accident Fund, hereinafter referred to as the "fund" or "state fund" in this article. This fund consists of annual premium charges, recoveries from the Second Injury Fund, recoveries by subrogation and, subject to subsection (B) of this section, of all income or revenue derived from investing these funds. Receipts for the credit of the fund and expenditures from the fund must be handled in the manner provided by law governing all state funds.

(B) One-third of the investment income generated in Fiscal Year 1990-91 and two-thirds of the income generated in Fiscal Year 1991-92 must be credited to the state fund in those years respectively. Thereafter all such income must be credited to the state fund except that the State Treasurer may charge the state fund, and credit to the general fund, the customary investment management fee.

---

§ 42-7-40. Application to State.

This article shall apply to the State including the State Guard and the National Guard.

---

§ 42-7-60. Officers and employees covered by article.

Notwithstanding anything to the contrary contained in § 42-1-130, the provisions of this article apply to all officers and employees of the State and of any county, municipality, or other political subdivision thereof or any agency or institution of the State which has elected to participate under this article under the provisions of § 42-7-50.

In cases of officers or employees who are on a partial or total fee basis or whose official duties require only part time the director may fix, for the purpose of this article, the average weekly wage of this officer or employee, not in excess of forty dollars and collect charges from the employer of this officer or employee on the basis of the average weekly wage so fixed.

Any client of the state agency of Vocational Rehabilitation, while involved in a program of assessment or work adjustment as defined in this section, who suffers an injury for which compensation is specifically prescribed in this title, may be awarded and paid compensation under the provisions of this title. For purposes of this section, "a client involved in a program of assessment or work adjustment" is defined as any client performing work tasks which are part of the program of Vocational Rehabilitation services for the individual and who in turn receives wage payments from the agency for the work performed.

Students of high schools, state technical schools, and state-supported colleges and universities while engaged

in work study, distributive education, or apprentice programs on the premises of private companies are also covered by the provisions of this title.

---

§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Council shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Council prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production

of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the Council

finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the Council feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the Council shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens of the State. When applicable, joint public hearings will be held in conjunction with any such hearings required by the U.S. Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the Council, the Council may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The Council shall act upon an application for a permit within ninety days after the application is filed. *Provided*, however, that in the case of minor developments, as defined in § 48-39-10, the Council shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the Council shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by the granting of the permit has the right of direct appeal to the Council. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder and the holder given an opportunity to present an explanation to the Council.

(F) Work authorized by permits issued hereunder shall be completed within three years after the date of issuance of the permit. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress.

§ 48-39-150. Approval or denial of permits; appeal to Council [For subsections (A)-(E), see bound volume.]

(F) Work authorized by permits issued under this chapter must be completed within five years after the date of issuance. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress. An extension only may be granted if the permitted project meets the policies and regulations in force when the extension is requested or the permittee agrees to accept additional conditions which would bring the project into compliance. The time periods required by this subsection must be tolled during the pendency of an administrative or a judicial appeal of the permit issuance.

[From and after July 1, 1994, this section reads as follows:]

(A) In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the department prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and

submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the department finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the department feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the department shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens

of the State. When applicable, joint public hearings will be held in conjunction with any such hearings required by the U. S. Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the department, the department may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The department shall act upon an application for a permit within ninety days after the application is filed. Provided, however, that in the case of minor developments, as defined in Section 48-39-10, the department shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the department shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by the granting of the permit has the right of direct appeal from the decision of the Administrative Law Judge to the Coastal Zone Management Appellate Panel. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder and the holder given an opportunity to present an explanation to the department.

(F) Work authorized by permits issued under this chapter must be completed within five years after the

date of issuance. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress. An extension only may be granted if the permitted project meets the policies and regulations in force when the extension is requested or the permittee agrees to accept additional conditions which would bring the project into compliance. The time periods required by this subsection must be tolled during the pendency of an administrative or a judicial appeal of the permit issuance